No. ___

Supreme Court, U.S.
F I L E D
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IN THE

Supreme Court Of The United States

October Term, 1994

LITTON SYSTEMS, INC.,

Petitioner,

v.

MARTHA CARROLL; JAMES CARROLL; ROSETTA EDWINA ROGERS; JAMES CARROLL, JR.; KEITH S. GENTLE; BELINDA GADDIS, individually and as next friend and parent of Justin Gaddis and Derrick Gaddis, both minors; RANDY GADDIS, individually and as next friend and parent of Justin Gaddis and Derrick Gaddis, both minors; FRED ALLEN CHAMBERS, individually and as next friend and parent of Rusty Chambers, a minor; DEBBIE CHAMBERS, individually and as next friend and parent of Rusty Chambers, a minor; BARBARA MESSER; ANCY SIMONDS, individually and as next friend and parent of Jennifer Simonds, a minor; JAMES GREEN; MARVIN GARRETT; KENNY GREEN; PEGGY GREEN; SANDRA HANCOCK, individually and as next friend and parent of Chuck Hancock, a minor; JAMES R. MESSER, individually and as next friend and parent of Jonathan Messer, a minor; MELANIE MESSER, individually and as next friend and parent of Jonathan Messer, a minor,

Respondents.

Petition For A Writ Of Certiorari to The United States Court Of Appeals for The Fourth Circuit

PETITITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a federal district court, consistent with this Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993), submit complex toxic tort claims to a jury in the absence of *any* admissible expert testimony on the questions of (a) exposure and (b) specific medical causation?

2. May a panel of the Fourth Circuit in an unpublished opinion ignore its published precedents on a dispositive issue?

LIST OF PARTIES AND RULE 29.1 LIST

The parties to the proceedings below are listed in the caption. The parent company of petitioner Litton Systems, Inc. is Litton Industries, Inc., which was named as a defendant below but was dismissed by the district court and was not an appellee. There are no subsidiaries of Litton Systems, Inc. which are not wholly owned.

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OPINIONS BELOW

The per curiam majority opinion for the Court of Appeals for the Fourth Circuit and the dissenting opinion have not been reported. They are reprinted in the Appendix hereto ("App."), p. 1a. The Fourth Circuit's Order denying petitioner's petition for rehearing and suggestion for rehearing in banc has not been reported. It is reprinted at App., p. 20a.

The memorandum decisions of the United States District Court for the Western District of North Carolina have not been reported. The decision adopting the recommended opinions of the United States Magistrate Judge and granting summary judgment to petitioner is reprinted at App., p. 22a. The decision denying respondents' motion to alter or amend judgment pursuant to Fed. R. Civ. P. 59(e) is reprinted at App., p. 30a. The Recommended Findings of Fact, Recommended Conclusions of Law, and Memorandum and Recommendation of the United States Magistrate Judge—all of which were adopted by the district court—have not been reported. They are reprinted at App., pp. 48a, 118a, and 181a respectively.

JURISDICTION

On February 1, 1995, the Fourth Circuit issued its opinion affirming in part and reversing in part the district court's grant of summary judgment to petitioner. Petitioner's timely petition for rehearing and suggestion for rehearing in banc was denied by the Fourth Circuit on March 6, 1995. App., p. 20a.

The jurisdiction of this Court to review the judgment of the Fourth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The text of Rules 104(a), (b) and 702 of the Federal Rules of Evidence; Rule 56(b), (c), (e) of the Federal Rules of Civil Procedure; Fourth Circuit Internal Operating Procedures 36.4

and 36.6; and the Fifth Amendment to the United States Constitution appears in the accompanying, separately bound Appendix.

STATEMENT OF THE CASE

On July 15, 1991, following extensive discovery, consideration of detailed depositions, affidavits, and documentary evidence, and full briefing and argument, the trial court in this multi-plaintiff toxic tort case determined that the entirety of respondents' expert testimony on exposure and individual medical causation should be excluded as speculative and unreliable under Fed. R. Evid. 702. In light of that ruling, the trial court held, in accordance with established Fourth Circuit precedents, that respondents lacked sufficient evidence to present their personal injury claims to a jury and entered judgment dismissing the claims.

On February 1, 1995, in an unpublished decision, a panel of the United States Court of Appeals for the Fourth Circuit unanimously *affirmed* the lower court's exclusion of all of plaintiffs' expert testimony on exposure and specific medical causation. By a 2-1 vote, however, the panel nevertheless *reversed* the entry of summary judgment on respondents' personal injury claims, reasoning that a lay jury could properly infer exposure and specific medical causation even in the absence of admissible expert opinions on those issues. This petition seeks a writ of *certiorari* to review the panel majority's reversal of summary judgment, which flies in the face of this Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* and ignores clear, established precedent in the Fourth Circuit itself.

The underlying facts in this case are set forth in the panel majority opinion of the Fourth Circuit and may be briefly summarized. Petitioner operates a manufacturing plant in Murphy, North Carolina ("the plant"). For varying periods of time respondents obtained drinking water from wells located across

a creek from petitioner's plant. *Id.*, p. 3a. From 1967 until about 1974, petitioner used trichloroethylene ("TCE"), a degreasing solvent, in its manufacturing process. *Id.* In 1986, in the course of closing a waste treatment system, petitioner detected TCE in the groundwater under its plant. *Id.* Petitioner then tested nearby residential wells, including those used by respondents, and found extremely low concentrations of TCE in those wells. *Id.*, pp. 3a-4a. Petitioner immediately provided bottled water to respondents and then placed and maintained carbon absorption filters on their wells. *Id.*, p. 4a.

In 1988, respondents filed this diversity action in the United States District Court for the Western District of North Carolina, alleging, *inter alia*, that they had incurred personal injuries as a result of encroachment of TCE into their wells. *Id.* Discovery proceeded pursuant to a case management order that provided for the filing of dispositive motions on causation and liability before addressing other issues. *Id.*, pp. 51a-52a.

At the completion of discovery, petitioner filed dispositive motions as to all of respondents' claims. *Id.*, p. 66a. For the purpose of these motions, petitioner assumed that the TCE found in 1986 in respondents' wells had originated at its plant. *Id.* However, petitioner sought to exclude as scientifically unreliable under Fed. R. Evid. 702 the expert testimony proffered by respondents to show that the TCE had entered their wells in 1970 and had been present in earlier years at concentrations much higher than those measured in 1986.[1] These theoretical expo-

[1] Specifically, by motion in limine, petitioner challenged the admissibility of the opinion of respondents' hydrogeologist, Mr. Gerald Moore, that TCE from the plant had crossed under the creek and arrived at respondents' wells in 1970 or at any other time prior to 1986. Mr. Moore had "acknowledged that under normal conditions, TCE would *not* be transported in the groundwater to the residential wells . . . ." *Id.*, p. 5a (emphasis added). While he had posited certain theoretical circumstances that would permit reversal of normal groundwater flow, he could not offer any evidence that these conditions had in fact ever occurred. *Id.* Petitioner also challenged the admissibility of the opinions of Dr. Hugh Spencer, upon whom respondents

sure calculations were essential to respondents' medical causation case, because the actual levels of TCE measured in 1986 were not regarded even by respondents' own medical experts as high enough to cause injury. *Id.*, pp. 7a, 11a.[2] Applying an analysis that anticipated this Court's opinion in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993), the district court held these opinions were speculative and not scientifically reliable and were, therefore, inadmissible. *Id.*, pp. 9a-10a, 130a-34a.

Concurrently, petitioner moved for summary judgment on medical causation. Among other things, petitioner pointed out that respondents' medical causation experts had based their opinions explicitly on the inadmissible exposure calculations of respondents' hydrogeologist, Mr. Moore, and chemodynamist, Dr. Spencer, and that, without those calculations, the medical experts could not testify that any respondent had more likely

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relied to provide evidence of dramatically higher levels of TCE in respondents' wells prior to 1986. *Id.*, p. 6a. The grounds for excluding Dr. Spencer's opinions included his lack of expertise in the area of concern, his reliance upon Mr. Moore's excluded opinions, the absence of any support in the scientific literature for his made-for-litigation methodology, the fact that his methodology had never been tested at other sites, and his concession that his methodology was actually contradicted by available data from the site in question. App., pp. 131a-34a.

[2] Measured concentrations of TCE in respondents' wells averaged between two and 20 parts per billion ("ppb"). App., pp. 3a-4a. By way of comparison, the Health Advisory for Trichloroethylene issued by the United States Environmental Protection Agency ("EPA"), which was submitted as part of the record below (*see, e.g.*, App., p. 112a), establishes a Drinking Water Equivalent Level for *lifetime* exposure, *i.e.*, a level that is expected to be *protective* of public health for non-carcinogenic endpoints, of 260 ppb. Similarly, the Maximum Contaminant Level ("MCL") for TCE established for public drinking water systems under the Safe Drinking Water Act ("SDWA"), 42 U.S.C. §§ 300f to 300j-10, is five ppb. That level reflects a theoretical excess cancer risk for lifetime exposure to TCE calculated by EPA to be 0.000026 percent, *see* 52 Fed. Reg. 25690, 25700 (1987), or one millionth the risk of cancer for the population at large (one in four). App., p. 108a.

than not been injured as a result of his or her exposure to TCE. The district court agreed and entered summary judgment against respondents. *Id.*, pp. 22a, 134a-36a.[3] Respondents' subsequent motion to alter or amend the judgment was denied. *Id.*, p. 30a.

On February 1, 1995, the Fourth Circuit issued its decision on respondents' appeal.[4] The Fourth Circuit's per curiam opinion *affirmed* in its entirety the district court's exclusion of respondents' proffered expert testimony. Citing *Daubert*, the Fourth Circuit upheld the district court's ruling that Mr. Moore's opinions were "unreliable and, therefore, . . . inadmissible." App., p. 10a. Similarly, the Fourth Circuit upheld the exclusion of Dr. Spencer's opinions because they had "absolutely no scientific support[,] . . . were imprudent and prone to enormous error." *Id.* Likewise, the Fourth Circuit upheld the exclusion of the testimony of respondents' experts on specific medical causation because they relied upon Dr. Spencer's inadmissible calculations. *Id.*, p. 11a.

The Fourth Circuit's decision thus left respondents without any admissible expert testimony on medical causation, other than general opinions that exposure to TCE at sufficient levels and for sufficient duration is *capable* of causing symptoms like those complained of by respondents (chiefly, headaches and other vague neurologic complaints). As a result, respondents could offer no expert testimony as to the levels of TCE to which they were actually exposed, the timing or duration of such

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[3] The district court also found other deficiencies in respondents' proffered medical causation opinions unrelated to the Moore and Spencer calculations. App., pp. 137a-43a. The Fourth Circuit found it unnecessary to reach these independent bases for excluding the causation opinions. App., p. 11a n.5.

[4] The Fourth Circuit's opinion was originally issued on January 13, 1995 as a per curiam decision without dissent. The court withdrew this opinion *sua sponte*, however, on January 20, 1995, and reissued it on February 1, 1995 with the accompanying dissent.

exposures, or whether any of their claimed injuries were more probably than not caused in fact by exposure to TCE.[5]

Having so ruled, the Fourth Circuit nevertheless *reversed* the district court's dismissal of respondents' personal injury claims. *Id.*, pp. 11a-12a. The Fourth Circuit concluded that a jury could "infer" long-term exposure and specific medical causation from the facts (a) that TCE had been used at the plant in the late 1960's and early 1970's, (b) that, for the purpose of its motions only, petitioner had not disputed that its plant was the source of the TCE found in respondents' wells in 1986, and (c) that admissible expert opinions had been provided that respondents' complaints were of a type *capable* of having been caused by exposure to TCE. *Id.*, p. 11a.

In response, the dissenting panel member observed that she did not "believe that a reasonable jury could find for [respondents] without expert testimony . . . ." *Id.*, p. 15a. As she stated,

> the three pieces of evidence remaining [to respondents after the exclusion of their expert testimony] . . . are simply not sufficient to support a reasonable inference that Litton's TCE caused plaintiffs' health problems. There must be some evidence that plaintiffs' wells contained TCE for a long enough time, and at a sufficiently high concentration, to cause their health problems.

Id., p. 16a. The dissent further stressed that, "[i]n a long line of decisions in this circuit, we have emphasized that proof of

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[5] The Fourth Circuit also reversed the dismissal of certain respondents' property damage claims, based in part on the reasoning it applied to the personal injury claims. App., pp. 12a-14a (lay jury could "infer" TCE concentrations higher than 5 ppb). Finally, the Fourth Circuit affirmed the dismissal of respondents' regulatory claims under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.*, and the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.* App., pp. 14a-15a. These rulings are not at issue in this petition.

causation must be such as to suggest 'probability' rather than mere 'possibility,' precisely to guard against raw speculation by the fact-finder." *Id.* (citing *Sakaria v. Trans World Airlines*, 8 F.3d 164, 172-73 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1835 (1994)). The dissent observed that:

> [t]he majority's inference—from the fact that plaintiffs exhibited symptoms of a type consistent with TCE exposure—that Litton's TCE was present in wells at a higher concentration than that measured in 1986 and that Litton's TCE therefore caused substantial injury and actual damage to certain plaintiffs, is precisely the type of "raw speculation by the fact-finder" that expert testimony concerning proof of causation is intended to guard against.

App., pp. 17a-18a. Litton's petition for rehearing was denied on March 6, 1995.

REASONS FOR GRANTING THE WRIT

In recent years courts and juries have been increasingly required to confront and resolve cases presenting complicated scientific issues, particularly in multi-party litigation such as this one involving toxic torts or environmental harm. The special problems presented by these cases have been identified by such bodies as the Federal Courts Study Committee[6] and the Carnegie Commission on Science, Technology, and Government[7] and more recently led the Federal Judicial Center to publish a detailed manual designed to assist the courts in managing the scientific evidence these cases require.[8] These same problems

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[6] Federal Courts Study Committee, *Report of the Federal Courts Study Committee* 97 (1990).

[7] Carnegie Study Commission on Science, Technology, and Government, *Science and Technology in Judicial Decision Making: Creating Opportunities and Meeting Challenges* (1993).

[8] Federal Judicial Center, *Reference Manual on Scientific Evidence* (1994).

prompted this Court in *Daubert* to set out at some length the standards to be applied, and the role to be played by the courts, to assure that the scientific evidence presented to juries is "reliable" and pertains to "scientific knowledge." 113 S. Ct. at 2794-95.

To be sure, the Court's decision in *Daubert* literally involved construction of a federal rule—Rule 702. However, the cornerstone of the Court's opinion, and the fundamental principle underlying the rule, is that juries should not be asked to render decisions on scientific issues unless provided with evidence that is scientifically reliable, *i.e.*, that is "based upon *scientific validity*." 113 S. Ct. at 2795 n.9 (emphasis added). For that reason, the Court held that trial judges must exercise a gatekeeping role to assure that only evidence that is relevant and scientifically reliable reaches a jury and, where such evidence on critical issues does not exist, to take the case from the jury. 113 S. Ct. at 2796-98.

In this respect, the Fourth Circuit's decision in this case fundamentally conflicts with *Daubert*. By excluding as speculative and scientifically unreliable respondents' proffered expert testimony on the critical issues of exposure and individual medical causation, while at the same time allowing the jury to draw inferences with respect to these very same issues, the Fourth Circuit has sanctioned a jury verdict on scientific issues that is devoid of evidentiary support having the requisite indicia of scientific validity. Moreover, in the process the Fourth Circuit has rendered futile the gatekeeping exercise required by *Daubert*. If the entirety of expert scientific testimony on crucial issues is excluded as unreliable but the case is still permitted to go to the jury, then the fundamental point of the exercise has been missed. To correct that error and to preserve the integrity of *Daubert*, the Court should grant review.

In addition, the action of the Fourth Circuit here particularly calls out for the Court's exercise of its supervisory powers.

The published precedents of the Fourth Circuit are absolutely clear that expert testimony on issues of exposure and individual medical causation is *required* for recovery in cases such as this one.[9] Yet, the panel majority decision below did not even cite those precedents, much less attempt to reconcile them with its decision in this case. The panel majority avoided the necessity to do so by invoking Fourth Circuit internal rules permitting designation of the opinion as unpublished. In so doing, the panel majority has undermined the principle of *stare decisis* and so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Court's power of supervision. For this reason as well, the petition should be granted.

I. Review Is Necessary To Resolve The Conflict Between This Court's Decision In *Daubert v. Merrell Dow Pharmaceuticals, Inc.* And The Fourth Circuit's Ruling In This Case That Toxic Tort Claims May Be Tried Without Any Admissible Expert Testimony On Exposure And Specific Medical Causation.

In *Daubert*, the Court held that federal district courts must perform a "gatekeeping" function to assure that proffered expert testimony is "reliable" and reflects "scientific knowledge." 113 S. Ct. at 2795-96, 2798. The "overarching subject [of that inquiry] is the scientific validity—and thus the evidentiary relevance and reliability—of the principles that underlie a proposed submission." 113 S. Ct. at 2797. By precluding introduction of opinion testimony that is *not* based on scientific knowledge, *Daubert* thus underscored the precept that verdicts must be based on reason, not speculation.[10] In this case,

[9] *See infra* pp. 12, 17. The Fourth Circuit's published precedents in this respect are in accord with the uniform decisions of other state and federal courts.

[10] *See Galloway v. United States*, 319 U.S. 372, 395 (1943) ("the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences . . ."); *Rogers v. Missouri P.R. Co.*, 352 U.S. 500, 564 (1957)

however, by affirming the district court's exclusion of the respondents' expert opinions on exposure and specific medical causation as unreliable and speculative while still allowing a lay jury to draw unassisted inferences on those same issues, the Fourth Circuit has assured that the verdict will be based on speculation rather than scientifically valid evidence. This violates *Daubert*.

1. To decide this case, a jury will have to draw conclusions as to *if* and *when* prior to 1986 TCE from petitioner's plant crossed under the creek and into respondents' wells in contravention of what experts on both sides agree is the normal direction of groundwater flow, *how long* the TCE was present in respondents' wells from 1970 to 1986, and *to how much* TCE respondents were thereby exposed.[11] In addition, the jury will have to decide *whether* the TCE to which respondents were exposed was both sufficient in dose to cause and did in fact cause respondents' health complaints.[12] Each of these issues *requires* proof by admissible expert evidence.

(opinion of Harlan, J.) ("it has always been the function of the court to see to it that jury verdicts stay within that boundary, that they be arrived at by reason and not by will or sheer speculation") (citation omitted).

[11] As recognized in the Federal Judicial Center's *Reference Manual on Scientific Evidence* ("*Reference Manual*"):

> [A] plaintiff will not be able to succeed in a toxic tort case unless he or she can prove *adequate exposure* to a toxic substance that was somehow connected to the defendant. Even if an expert testifies that Substance X *can* cause the plaintiff's injury, *this testimony will not suffice* if the plaintiff failed to produce evidence that he or she was exposed to Substance X . . . *at a significant level.*

Reference Manual at 47-48 (footnotes omitted; emphasis added).

[12] The case law is uniform in requiring as elements of proof in toxic tort cases that a plaintiff establish *both* general causation (*i.e.*, that the substance in question is *capable* of causing the observed effect) and specific causation (*i.e.*, that it did so in fact in the case before the court). *See, e.g., In re Agent Orange Product Liability Litigation*, 996 F.2d 1425, 1437 (2d Cir. 1993),

In prior decisions of this Court,[13] in learned treatises,[14] and in innumerable decisions of circuit courts of appeals,[15] lower federal courts,[16] and state courts,[17] the necessity of

cert. denied, 114 S. Ct. 1125 (1994) (distinguishing general and individual causation); *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188, 1200 (6th Cir. 1988) (recovery requires proof of both general and individual causation). *See also Reference Manual* at 167 ("plaintiff must establish not only that the defendant's agent is capable of causing disease but also that it did cause the plaintiff's disease").

[13] *See Salem v. United States Lines Co.*, 370 U.S. 31, 35 (1962) (distinguishing "causes of action in which the law predicates recovery upon expert testimony" from cases in which "men of common understanding, are as capable of comprehending the primary facts and of drawing correct conclusions from them as are witnesses possessed of special or peculiar training . . ."); *Addington v. Texas*, 441 U.S. 418, 430 (1979) ("untrained lay juror [and] . . . even a trained judge . . . [are] required to rely upon expert opinion" in civil commitment proceedings).

[14] Fowler V. Harper *et al.*, *The Law of Torts* § 20.2 (2d ed. 1986) ("the question of causal relation is so esoteric that lay minds cannot form any intelligent judgment about it without expert aid");W. Page Keeton *et al.*, *Prosser and Keeton on The Law of Torts* § 41 (5th ed. 1984) (same).

[15] *See, e.g., Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311 (9th Cir. 1995) (summary judgment granted in Bendectin case after exclusion of plaintiffs' expert testimony); *Knudsen v. Secretary of the Department of Health and Human Services*, 35 F.3d 543, 548 (Fed. Cir. 1994) (causation in toxic tort case relating to vaccine "must be supported by a sound and reliable medical and scientific explanation"); *Claar v. Burlington Northern R.R. Co.*, 29 F.3d 499, 503 (9th Cir. 1994) (summary judgment properly granted in FELA case, despite lowered standard of causation, when plaintiff's evidence concerning specific medical causation properly excluded); *Porter v. Whitehall Laboratories, Inc.*, 9 F.3d 607, 612 (7th Cir. 1993) ("expert testimony is necessary to determine the cause of . . . renal failure").

[16] *See, e.g., Eppler v. Ciba-Geigy Corp.*, 860 F. Supp. 1391, 1394-95 (W.D. Mo. 1994) ("[t]he task of proving that Aquazine proximately caused Karen Eppler's injuries inherently calls upon plaintiffs to present medical and scientific evidence").

[17] *See, e.g., Money v. Manville Corp. Asbestos Disease Compensation Trust Fund*, 596 A.2d 1372, 1376 (Del. 1991) ("proximate cause in matters

expert testimony in cases involving medically-complex issues has been recognized repeatedly. Indeed, the published precedents of the Fourth Circuit itself explicitly so hold. In *Fitzgerald v. Manning*, 679 F.2d 341 (4th Cir. 1982), for example, the Fourth Circuit held that "proof of causation—that is that the defendant's negligence was 'more likely' or 'more probably' the cause of the plaintiff's injury—*requires expert testimony*." *Id.* at 350 (emphasis added). *See also Sakaria v. Trans World Airlines*, 8 F.3d at 172-73 (refusing to allow causation issue to go to the jury when plaintiff's only expert testimony was inadmissible); *Rohrbough v. Wyeth Laboratories, Inc.*, 916 F.2d 970, 972 (4th Cir. 1990) ("proof of causation must be by expert testimony").[18]

2. The only remnant of respondents' expert case to survive the Fourth Circuit's scrutiny is testimony that exposure to TCE under *some* conditions and at *some* level *can* cause symptoms of the type about which respondents complain. In the absence of admissible expert testimony on hydrogeology and environmental degradation of chemicals, however, the jury's knowledge that TCE was found in respondents' wells in 1986 does not support a reasonable inference that TCE was there in 1970, or at any other specific time prior to when it was found, or at any level sufficient to cause human health problems.[19]

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involving the pathology of a disease . . . is not within the common knowledge of laymen and requires expert medical testimony").

[18] This case may be distinguished, therefore, from those cases in which expert testimony may be *helpful* but is not *essential* to establish a plaintiff's claim. In a case challenging the adequacy of a product warning, for example, expert testimony may assist the jury but is not typically required. A lay jury is fully competent to draw conclusions about warning adequacy. *See, e.g., Brassette v. Burlington Northern, Inc.*, 687 F.2d 153, 158 (8th Cir. 1982). A lay jury is not similarly situated with respect to complicated medical and scientific issues.

[19] As the dissent observed, without the expert testimony of Mr. Moore and Dr. Spencer, a jury could not reasonably "infer from the admitted evidence that the contamination of the wells occurred prior to 1986." App.,

Similarly, in the absence of admissible expert testimony that exposure to TCE more likely than not caused each respondent's specific health complaints, the evidence that respondents' complaints in general are of a type that can be caused by TCE still requires the jury to speculate concerning whether that did, in fact, occur in this case. In short, the Fourth Circuit's decision does not assure that a verdict will be reached that is based on scientifically valid evidence, as required by *Daubert*; to the contrary, by permitting the jury to draw inferences on these issues after precluding respondents' experts from doing so, the Fourth Circuit has invited a verdict that amounts, in the words of the dissent, to "raw speculation."

3. In these circumstances, the Fourth Circuit panel majority was plainly wrong in reversing the trial court's dismissal of respondents' claims. Indeed, in *Daubert* the Court made clear that, even when expert testimony passes muster under Rule 702, summary judgment is still appropriate if the admissible evidence is sufficiently weak that the jury will be required to guess in order to reach a verdict.[20] In even more extreme cases such as this, when the party carrying the burden of establishing medical

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p. 17a. "No admissible expert evidence indicated the length of plaintiffs' exposure . . . before 1986." *Id.*

[20] In *Daubert*, the Court emphasized the role of Fed. R. Civ. P. 56 to assure that verdicts are based on reason:

> [I]n the event the trial court concludes that the scintilla of evidence presented supporting a position is insufficient to allow a *reasonable juror* to conclude that the position more likely than not is true, the court remains free to direct a judgment. . . and likewise to grant summary judgment. . . .

113 S. Ct. at 2798 (citations omitted; emphasis added). In support, the Court cited with approval *Turpin v. Merrell Dow Pharmaceuticals, Inc.*, 959 F.2d 1349 (6th Cir.), *cert. denied*, 113 S. Ct. 84 (1992), and *Brock v. Merrell Dow Pharmaceuticals, Inc.*, 874 F.2d 307 (5th Cir.), *modified*, 884 F.2d 166 (5th Cir. 1989), *cert. denied*, 494 U.S. 1046 (1990). In both of these cases, summary judgment was held to be appropriate, indeed required, even though plaintiffs had proffered admissible scientific evidence.

causation *cannot* adduce admissible expert testimony in support, *Daubert* necessarily means that summary judgment should be entered for the defendant. Put differently, when hydrogeologists, chemists, toxicologists, and physicians are precluded from offering opinions as to exposure and specific medical causation in a case because such opinions are not "reliable" or based on "scientific knowledge," the jury must likewise be precluded from rendering its own speculative opinion in the form of a verdict on those same issues. Any other result renders the entire "gatekeeping" exercise in *Daubert* a futility.

The Fourth Circuit's decision in this case has transformed *Daubert* from a case intended to assure that jury verdicts in cases involving scientific issues are based only on *good* science to one that permits juries to render verdicts in such cases on the basis of *no* science. To prevent that result and to assure that the Fourth Circuit and other federal courts fully comply not only with the exact letter of *Daubert*, but with its underlying principles of rational jury decisionmaking, this Court should grant the writ of *certiorari*.

II. The Fourth Circuit's Unpublished Decision, Which Ignores Its Own Published Precedent, So Far Departs From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Power Of Supervision.

In this case, additional reasons exist for the Court to grant *certiorari* as an exercise of its supervisory powers.[21] As noted

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[21] Under its supervisory powers, the Court may act "to protect the integrity of the federal system," *Frazier v. Heebe*, 482 U.S. 641, 647 n.7 (1987), or "to preserve judicial integrity," *United States v. Hasting*, 461 U.S. 499, 505 (1983). Thus, the Court has invalidated local court practices that are "irrational," *Frazier v. Heebe*, 482 U.S. at 646, or which fail to comport with "basic notions of fairness," *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 808 (1987). The Fourth Circuit's failure to publish its opinion should not and does not insulate its decision from appropriate review by this Court. *See Commissioner v. McCoy*, 484 U.S. 3, 7 (1987).

above, the panel majority's decision is not only at odds with *Daubert*, it is also patently inconsistent with directly applicable published precedents of the Fourth Circuit, which—but for the panel's use of an unpublished opinion—should have been binding as a matter of *stare decisis*. The panel majority's disregard of prior Fourth Circuit precedents threatens the important policies underlying *stare decisis*, places the district court on remand in an intractable dilemma in which whatever action that court takes will be erroneous, and has serious due process implications in the circumstances of this case.

1. Once a panel of the Fourth Circuit has decided an issue and published its opinion, all future panels are required to adhere to the precedent, unless and until the earlier decision is overruled in banc.[22] This rule—mirrored in every circuit—supports public confidence that the law is predictable and not dependent upon the happenstance of which judges are sitting on any particular panel.

While recognizing the importance of *stare decisis* in its published decisions, the Fourth Circuit has adopted rules permitting panels to decide cases in *unpublished* opinions having essentially no precedential value. *See* Fourth Circuit Internal Operating Procedures ("IOP") 36.4, 36.6; App., pp. 3a, 239a. IOP 36.4 allows the Fourth Circuit to dispose of cases via unpublished opinions even when the disposition reverses the district court or when a member of the panel dissents. *Id.*

The Fourth Circuit's rules allowing disposal of cases via unpublished "per curiam" opinions have great potential for severely compromising the quality of justice afforded liti-

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[22] *See, e.g., Etheridge v. Norfolk & Western Ry.*, 9 F.3d 1087, 1090 (4th Cir. 1993) (decision of one panel becomes the law of the circuit unless overruled by a subsequent in banc opinion); *Norfolk & Western Ry. v. Director, OWCP*, 5 F.3d 777, 779 (4th Cir. 1993) ("[e]ven if we were so inclined . . . a panel of this court may not overrule another panel's decision").

gants.[23] Commentators have noted that "limited publication reduces judicial responsibility by removing the constraints that stare decisis places upon the court . . . [and] may permit judges to approach their jobs . . . without the real thought and effort that precedential decision making requires." Reynolds, *supra*, at 581.[24] "[U]npublished opinions 'increase the risk of nonuni-

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[23] This Court has expressed concern about the non-publication practices of the federal appellate courts. In *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696, 2702 n.3 (1993), for example, the Court found it "remarkable and unusual" that the Fourth Circuit would affirm a judgment that an Act of Congress was unconstitutional as applied via an unpublished per curiam opinion. *See also County of Los Angeles v. Kling*, 474 U.S. 936, 938 (1985) (Stevens, J., dissenting) (court of appeals' "decision not to publish the opinion or permit it to be cited—like the decision to promulgate a rule spawning a body of secret law—was plainly wrong"). Commentators have observed that the Fourth Circuit appears to publish fewer of its opinions than do the other circuits. *See* Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 Mich. L. Rev. 940, 955 n.74 (1989) ("the Fourth Circuit left an astonishing 80.2% of its opinions unpublished"); William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. Chi. L. Rev. 573, 587 (1981) ("Reynolds") (Fourth Circuit failed to publish 72.0% of its opinions). *See also* Howard Slavitt, *Selling the Integrity of the System of Precedent: Selective Publication, Depublication, and Vacatur*, 30 Harv. Civ. Rights-Civ. Lib. L. Rev. 109, 110 (1995) ("Slavitt") (criticizing Fourth Circuit failure to publish a "ground-breaking decision").

[24] *See also* Jenny Mockenhaupt, *Assessing the Nonpublication Practice of the Minnesota Court of Appeals*, 19 Wm. Mitchell L. Rev. 787, 802 (1993) ("[u]npublished opinions . . . reduce judicial accountability"); Slavitt, *supra*, at 119 ("selective publication . . . compromise[s] the judiciary's ability to create a system of rules based on principle"); Martha J. Dragich, *Will The Federal Courts of Appeals Perish if They Publish? Or Does The Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 Amer. L. Rev. 757, 800 (1995) ("selective publication practices, and noncitation rules undermine certainty, predictability, and fidelity to authority[;] . . . breed confusion about the relevance of various statements from a court[;]. . . give the impression of arbitrary, cavalier action [; and] . . . threaten confidence in the judicial system").

formity; allow difficult issues to be swept under the carpet; and result in a body of "secret law" practically inaccessible to many lawyers.'" Dragich, *supra*, at 785 (quoting *National Classification Comm'n v. United States*, 765 F.2d 164, 173 n.2 (D.C. Cir. 1985) (Wald, J.)).[25]

2. That potential for unfair prejudice was realized in the present case. As noted above, the published opinions of the Fourth Circuit indisputably require proof of specific medical causation by expert testimony. In *Fitzgerald*, the Fourth Circuit explicitly held: "proof of causation—that is that the defendant's negligence was 'more likely' or 'more probably' the cause of the plaintiff's injury—*requires expert testimony*." 679 F.2d at 350 (emphasis added). In *Rohrbough*, the Fourth Circuit reiterated that "proof of causation must be by expert testimony." 916 F.2d at 972. Petitioner relied on *Fitzgerald* and *Rohrbough* in guiding its litigation strategy, formulating its dispositive motions, and arguing to the district court, and the district court repeatedly cited these cases—and acted in accordance with their holdings—in its opinion granting summary judgment.[26] Yet, despite the critical importance of *Fitzgerald* and *Rohrbough* as the basis for the district court's grant of summary judgment, the Fourth Circuit's opinion reversing the district court gives no indication that the panel majority even considered these cases.

Had the Fourth Circuit been required to issue a published opinion in this case, it would have had no choice but to confront head-on the conflict with *Fitzgerald* and *Rohrbough* as well as

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[25] Accordingly, commentators have long recommended that courts of appeals publish all opinions in which the district court is reversed or in which the decision is not unanimous. *See* Reynolds, *supra*, at 612, 618; Dragich, *supra*, at 790-91, 801; Hon. Philip Nichols, Jr., *Selective Publication of Opinions: One Judge's View*, 35 Amer. L. Rev. 909, 926 (1986).

[26] *See* App., pp. 122a (sufficiency of evidence is governed by federal law), 135a-36a (mere possibility of causation is insufficient), 136a ("plaintiffs must produce expert testimony concerning causation"), 208a-09a (plaintiffs must establish individual causation via expert testimony).

the prospect that its decision would itself become precedent. Unless the panel majority had been both (1) able to find a meaningful distinction between the Fourth Circuit's earlier published decisions and this case (or able to muster sufficient support to overrule them) and (2) willing to establish as precedent the proposition that toxic tort plaintiffs are entitled to reach a jury notwithstanding the absence of expert testimony on exposure and specific medical causation, it would have had no choice but to affirm the district court's grant of summary judgment. By choosing not to publish its opinion, the Fourth Circuit avoided the obligation to reconcile its decision with its own squarely apposite precedent.[27] It also avoided considering whether allowing toxic tort claims to proceed without expert testimony on exposure and specific medical causation would be wise for the judicial system.

3. The Fourth Circuit's decision not only conflicts with *Daubert* and ignores Fourth Circuit precedent, it also leaves the trial court on remand in an intractable dilemma. The *published* opinions of the Fourth Circuit, exemplified by *Fitzgerald* and *Rohrbough*, would *require* the trial court to grant a directed

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[27] The mischief worked by the failure to publish the opinion below is illustrated not only by the conflict with *prior* published opinions, but by the opinion's inconsistency with a *subsequent* Fourth Circuit decision. In a separate portion of its opinion below, *see* App., pp. 12a-14a, the panel majority also reversed the district court's ruling that respondents' trespass and nuisance claims should be dismissed because respondents could not demonstrate that the extremely low levels of TCE measured in their wells were of toxicologic concern. App., pp. 111a-14a, 154a-59a. In so ruling, the panel majority concluded that proof that TCE had been measured on some occasions at levels which exceeded the MCL of 5 ppb for *public* drinking water systems, *see supra* note 2, sufficed to show "substantial injury or actual damage" for purposes of a nuisance and trespass claim. App., p. 13a. In a published opinion issued by another panel in a different case just weeks later, however, the Fourth Circuit held that claims for nuisance *cannot* be made out unless "TCE levels . . . rise to the level of toxicological concern." *In re Wildewood Litigation*, __ F.3d __, 1995 WL 226563, *3 (4th Cir. 1995). The "public" law of the Fourth Circuit and the "secret" law applied in this case simply cannot be reconciled.

verdict in favor of petitioner at the conclusion of the evidence because respondents will have put on no expert testimony concerning exposure or specific medical causation. If that court grants a directed verdict, the trial will clearly have been futile. On the other hand, if the trial court believes it must deny a directed verdict because of the Fourth Circuit's ruling here, it will then have to ignore what the Fourth Circuit has said in its published decisions. The trial court should not be placed in this impossible situation.

4. Nor is this simply a matter of internal judicial housekeeping; to the contrary, in the circumstances of this case, the Fourth Circuit's action implicates important considerations of due process. A litigant in the federal courts must be able to rely upon the published precedents of those courts, unless and until such precedents are properly overruled.[28] A single panel's unbridled discretion to disregard the published precedents of the circuit in which it sits, by means of issuing an unpublished decision, is inconsistent with the very concept of ordered justice.[29]

Indeed, the Fourth Circuit's unexplained sidestepping of its published precedents in this case in an unpublished opinion with no precedential effect arguably creates an arbitrary legal standard applicable to petitioner alone in violation of due process.[30] As this Court stated in *Giaccio v. Pennsylvania*, 382 U.S. 399, 403 (1966):

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[28] *See Missouri v. Jenkins*, 495 U.S. 33, 46 n.14 (1990) (purpose of in banc review is maintenance of intracircuit uniformity); *Moody v. Albemarle Paper Co.*, 417 U.S. 622, 626 (1974) (same).

[29] As Judge Wald has observed, "it is imperative that we scrutinize our selection of those cases to be disposed of . . . without precedential effect ever more carefully so as to avoid confusion, repetition, nonuniformity, and even skepticism about the way we do our job." *National Classification Comm'n v. United States*, 765 F.2d 164, 175 (D.C. Cir. 1985) (separate statement).

[30] *See Glidden v. Zdanok*, 370 U.S. 530, 543 (1962) ("the practical consideration underlying the doctrine of stare decisis [is] protection of generated expectations"); *Vitek v. Jones*, 445 U.S. 480, 489 (1980) (due

> Certainly one of the basic purposes of the Due Process Clause has always been to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land. Implicit in this constitutional safeguard is the premise that the law must be one that carries an understandable meaning with legal standards that the courts must enforce.

It is the essence of due process to preclude "ad hoc and subjective" determinations, *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972), and the quintessential means by which ad hoc and subjective determinations are avoided is via *stare decisis*. *Stare decisis* thus constitutes one of the most important "settled usages and modes of procedure" of the federal courts.[31]

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process interest is created by "'objective expectation, firmly fixed in state law and practice'") (citation omitted); *Caldwell v. Texas*, 137 U.S. 692, 697 (1891) ("due process is . . . secured by the law operating on all alike . . .").

[31] *See Ochoa v. Hernandez y Morales*, 230 U.S. 139, 161 (1913) ("all authorities agree that [due process] inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing"). This Court has frequently observed that judicial conduct is limited by the requirements of due process. *See, e.g., Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971) (due process prohibits the application of collateral estoppel to one who did not appear in the prior action); *Universal Oil Prods. Co. v. Root Refining Co.*, 328 U.S. 575, 580 (1946) (a court may not deprive a successful party of its judgment on the ground the judgment was obtained by fraud without a "proper hearing"); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner") (quotations omitted); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (due process right to be heard in a meaningful manner includes the right to an impartial and disinterested tribunal); *Jordan v. Massachusetts*, 225 U.S. 167, 176 (1912) (due process requires mentally competent tribunal). Significantly, the due process right to a meaningful hearing includes the right not to be subjected to a judicial deprivation of property in the absence of evidence on a key element of the claim against a defendant, *cf. Thompson v. Louisville*,

Rather than demonstrating fidelity to the settled usages and modes of procedure of the law, the Fourth Circuit panel majority's decision reflects indifference. Its unexplained refusal to follow the holdings of *Fitzgerald* and *Rohrbough* can only be described as an "ad hoc and subjective" determination, raising serious due process concerns and presenting clearly the dangers of "secret law." This Court's intercession, in the exercise of its supervisory powers over the lower federal courts, is essential to avoid that result.

CONCLUSION

For all of these reasons, *certiorari* should be granted.

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June 5, 1995.

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362 U.S. 199, 206 (1960) ("it [is] a violation of due process to convict and punish a man without evidence of his guilt"); *Garner v. Louisiana*, 368 U.S. 157, 163 (1961) (convictions reversed on due process grounds because they were "so totally devoid of evidentiary support"), or even in the *presence* of evidence that is nevertheless insufficient to allow a rational trier of fact to find against the defendant, *cf. Jackson v. Virginia*, 443 U.S. 307 (1979); *Washington v. United States*, 357 U.S. 348 (1958).